

May 20, 2011

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: ***In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations, WT Dkt No. 11-65 – Objection to Disclosure of Confidential and Highly Confidential Information to Christopher Marlborough and Antonio Vozzolo***

Dear Ms. Dortch:

Pursuant to a Protective Order for the AT&T/T-Mobile USA proceeding,¹ AT&T Inc. (“AT&T”), Deutsche Telekom AG (“Deutsche Telekom”), and T-Mobile USA, Inc. (“T-Mobile”; collectively with AT&T and Deutsche Telekom, “Applicants”) object to the Acknowledgments of Confidentiality (“Acknowledgments”) filed in the above-referenced docket on behalf of Christopher Marlborough and Antonio Vozzolo of Faruqi & Faruqi, LLP (collectively, “Faruqi Firm”).² The Faruqi Firm has worked closely, and shares a common address, with the attorneys at Bursor & Fisher, P.A. (collectively, “Bursor Firm”), who filed Acknowledgments on May 9, 2011.³ Applicants filed an objection to

¹ *In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations*, WT Dkt No. 11-65, NRUF/LNP Protective Order, DA 11-711 (WTB rel. Apr. 18, 2011) (“*Protective Order*”).

² See Letter from Christopher Marlborough, Faruqi & Faruqi, LLP, to Marlene H. Dortch, Secretary, FCC (May 9, 2011). The Faruqi Firm apparently filed its Acknowledgments via FedEx. Although the package was received in the Commission’s mail room on May 11, 2011, the Acknowledgments were not posted in the Electronic Comment Filing System docket for this proceeding until May 17, 2011. As the Faruqi Firm did not serve us with its Acknowledgments (the *Protective Order* did not require it to do so), Applicants had no way of being aware of the Acknowledgments until they were posted in ECFS. Pursuant to Paragraph 5 of the *Protective Order*, Applicants are filing this Objection within three business days of that date.

³ See Letter from Joseph I. Marchese, Bursor & Fisher, P.A., to Marlene H. Dortch, Secretary, FCC (May 9, 2011).

the disclosure of confidential information to the Bursor Firm on May 12, 2011,⁴ and Applicants now object to the Faruqi Firm for the same reasons.⁵

The Faruqi Firm has appeared with the Bursor Firm in a number of class actions. For instance, the Faruqi Firm and the Bursor Firm jointly represented plaintiffs in a proceeding consolidating multiple class actions brought against AT&T and other wireless carriers, and the Faruqi Firm fought to have Scott Bursor named as plaintiffs' lead trial counsel in one of those matters.⁶ Similarly, the Faruqi Firm's website states, "Consumers represented by the law firm of Faruqi & Faruqi, LLP and the Law Offices of Scott A. Bursor have filed a class action lawsuit against the makers of Avacor for false and deceptive trade practices."⁷ Given the close relationship between the two firms, Applicants have the same concerns about the Faruqi Firm that gave rise to the Bursor Objection.

Applicants objected to the Acknowledgments filed by the Bursor Firm because it is actively litigating unrelated class actions against AT&T.⁸ Thus, we wrote, "Providing them access to confidential and highly confidential information in this proceeding raises precisely the same risks as providing access to counsel engaged in Competitive Decision-Making."⁹ In light of the close ties between the Bursor Firm and the Faruqi Firm, the Faruqi Firm's Acknowledgments suffer from the very same defect. Like the Bursor Firm lawyers, the Faruqi Firm lawyers will be unable to forget what they learn or "split their brains in two" to keep the confidential and highly confidential information to which they

⁴ See Letter from Peter J. Schildkraut, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (May 12, 2011) (Exhibit A, "Bursor Objection").

⁵ Applicants hereby incorporate by reference the Bursor Objection. Applicants presume that the Faruqi Firm and the Bursor Firm represent the same clients in this matter, but Applicants cannot be sure because the Bursor Firm has identified only one of its clients to counsel for AT&T and the Faruqi Firm did not identify its clients when it submitted its Acknowledgments.

⁶ See, e.g., Declaration of Nadeem Faruqi in Support of Plaintiff's Ex Parte Application to Remand Case and to Appoint Lead Trial Counsel at 1, *In re Cellphone Termination Fee Cases*, No. J.C.C.P. 4332 (Cal. Super. Ct. July 8, 2009) (stating that "[d]ue to his expertise in the field, we asked Scott Bursor to jointly represent Ms. Meoli with us, and to take the lead role in prosecuting her case against AT&T Wireless Services, Inc." in a request to appoint Mr. Bursor as Lead Trial Counsel) (Exhibit B).

⁷ Avacor, http://www.faruqilaw.com/show_case.php?id=117 (last visited May 18, 2011) (asking clients to contact the firm "by calling us at (212) 983-9330 or (877) 247-4292 or e-mail us at avozzolo@faruqilaw.com"); see also Our Attorneys, Christopher Marlborough, http://www.faruqilaw.com/view_attorney.php?id=48 (last visited May 18, 2011) (describing Mr. Marlborough's active involvement in the matter).

⁸ Bursor Objection.

⁹ *Id.* at 1. Undefined capitalized terms have the meanings supplied in the *Protective Order*.

seek access from being used unfairly to the detriment of Applicants, other carriers, and the public interest in competition.

The Faruqi Firm's submission of Acknowledgments is particularly curious because, so far as we are aware, they previously have not participated as counsel in any FCC proceeding for approval of a merger or acquisition. Indeed, as noted in the Bursor Objection, "Counsel for Applicants recall no other instance in the numerous transactions in which they have participated where a class action lawyer, representing individuals, has sought access to confidential or highly confidential information in the record."¹⁰ The Faruqi Firm appears to have made only one filing with the Commission in the last decade, and that filing was in a declaratory ruling proceeding that was related to litigation the Faruqi Firm had pending in court.¹¹ The firm's appearance in this transfer of control proceeding, with no history of such involvement in the past, raises further concerns about how the confidential and highly confidential information will be used.

As Applicants have stated before, they welcome meaningful public participation in this proceeding and do not submit objections lightly. To date, Applicants have cleared 88 Outside Counsel (including non-attorney staff) and 27 Outside Consultants, collectively representing 23 parties, for access to confidential or highly confidential information. Applicants have filed objections only in five cases where they clearly have been warranted: the Bursor Firm, Economics and Technology, Inc.,¹² and the Faruqi Firm, all three of which are interrelated, as well as three management consultants from PRTM Management Consultants¹³ and Mr. Leo A. Wrobel of TelLAWCom Labs Inc.¹⁴

¹⁰ Bursor Objection at 3.

¹¹ Petition for Declaratory Ruling, *In re Petition of Wireless Consumers Alliance et al. for a Declaratory Ruling Regarding Cellphone 911 Requirements in Response to Referral from the United States District Court for the Northern District of Illinois*, WT Dkt No. 99-328 (filed Oct. 6, 2003) (seeking a declaratory ruling from the Commission regarding its interpretation of terms related to cell phone 911 rules). This petition was the only one found in a search of the Commission's Electronic Comment Filing System for filings received on or after May 10, 2000 with "Faruqi," "Christopher Marlborough," or "Antonio Vozzolo" in the Name of Filer, Lawfirm Name, or Attorney/Author Name fields.

¹² See Letter from Peter J. Schildkraut, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (May 16, 2011) (objecting to ETI).

¹³ See Letter from Peter J. Schildkraut, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (May 11, 2011) (objecting to the PRTM management consultants).

¹⁴ See Letter from Peter J. Schildkraut, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (May 18, 2011) (objecting to the Mr. Leo A. Wrobel).

Marlene H. Dortch, Esq.

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For these reasons, the Commission should dismiss or deny the Acknowledgments of Confidentiality submitted by the Faruqi Firm.

Respectfully submitted,

/s/ Peter J. Schildkraut

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Counsel for AT&T Inc.

/s/ Nancy J. Victory

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Counsel for Deutsche Telekom AG
and T-Mobile USA, Inc.

Attachments

cc: Attached Service List

EXHIBIT A

May 12, 2011

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: ***In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations, WT Dkt No. 11-65 – Objection to Disclosure of Confidential and Highly Confidential Information to Scott A. Bursor, L. Timothy Fisher, Joseph I. Marchese, and Sarah N. Westcot***

Dear Ms. Dortch:

Pursuant to a Protective Order for the AT&T/T-Mobile USA proceeding,¹ AT&T Inc. (“AT&T”), Deutsche Telekom AG (“Deutsche Telekom”), and T-Mobile USA, Inc. (“T-Mobile”; collectively with AT&T and Deutsche Telekom, “Applicants”) object to the Acknowledgments of Confidentiality (“Acknowledgments”) filed in the above-referenced docket on May 9, 2011 on behalf of Scott A. Bursor, L. Timothy Fisher, Joseph I. Marchese, and Sarah N. Westcot from the law firm of Bursor & Fisher, P.A. (collectively, “Bursor Firm”).² The Bursor Firm is actively litigating unrelated class actions against AT&T.³ Providing them access to confidential and highly confidential information in this proceeding raises precisely the same risks as providing access to counsel engaged in Competitive Decision-Making.⁴ Accordingly, Applicants object to their Acknowledgments.

¹ *In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations*, WT Dkt No. 11-65, NRUF/LNP Protective Order, DA 11-711 (WTB rel. Apr. 18, 2011) (“*Protective Order*”).

² See Letter from Joseph I. Marchese, Bursor & Fisher, P.A., to Marlene H. Dortch, Esq. (May 9, 2011).

³ E.g., *Hendricks v. AT&T Mobility*, No. C11-00409 (N.D. Cal. filed Jan. 27, 2011) (putative class action alleging artificial inflation of data usage and charges); *Thein v. AT&T Mobility*, No. SACV10-01796 (C.D. Cal. filed Nov. 22, 2010) (putative class action alleging artificial inflation of data usage and charges); *Cook v. AT&T Mobility*, No. CV10-08870 (C.D. Cal. filed Nov. 18, 2010) (putative class action alleging artificial inflation of data usage and charges).

⁴ Undefined capitalized terms have the meanings supplied in the *Protective Order*.

Mr. Bursor has run a highly successful business filing class action lawsuits against AT&T, T-Mobile, and other wireless carriers over the past few years. The following are among the cases he has litigated:

- Mr. Bursor and his co-counsel garnered a \$5.7 million attorneys' fee as part of the settlement in *Mendoza v. Cingular Wireless LLC*.⁵
- "Mr. Bursor negotiated and obtained court-approval for a nationwide class action settlement in *Nguyen v. T-Mobile USA, Inc.* . . ."⁶
- "Ayyad v. Sprint Spectrum L.P. Mr. Bursor was the lead trial lawyer representing a class of approximately 1.9 million California consumers who were charged an early termination fee under a Sprint cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. After a five-week combined bench-and-jury trial, the jury returned a verdict in June 2008 and the Court issued a Statement of Decision in December 2008 awarding the plaintiffs more than \$299 million. Sprint's appeal from this trial is pending."⁷
- "White v. Cellco Partnership d/b/a Verizon Wireless. Mr. Bursor was the lead trial lawyer representing a class of approximately [sic] 1.4 million California consumers who were charged an early termination fee under a Verizon cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. In July 2008, after Mr. Bursor presented plaintiffs [sic] case-in-chief, rested, then cross-examined Verizon's principal trial witness, Verizon agreed to settle the case for a \$21 million cash payment and agreed to an injunction restricting Verizon's ability to impose early termination fees in future subscriber agreements."⁸

So far as we are aware, Mr. Bursor previously has not participated as counsel in any FCC proceeding for approval of a merger or acquisition. Indeed, in the last decade, Mr. Bursor or his firm appear to have participated only in three declaratory ruling proceedings before the Commission.⁹ Each was related to litigation Mr. Bursor had pending before the courts.

⁵ No. J.C.C.P. 4332 (Cal. Super. Ct. settlement entered July 21, 2010) (subsequent history omitted).

⁶ Recent Cases, <http://www.bursor.com/cases.php> (last visited May 12, 2011).

⁷ Trial Results, <http://www.bursor.com/trialresults.php> (last visited May 12, 2011).

⁸ *Id.*

⁹ See *In re BellSouth's Request for Declaratory Ruling the State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Dkt

Footnote continued on next page

Having heretofore had no interest in FCC transfer of control or assignment proceedings, Mr. Bursor and his colleagues have now filed Acknowledgments of Confidentiality seeking access to highly confidential information in the record of this proceeding. This was a noteworthy occurrence. Counsel for Applicants recall no other instance in the numerous transactions in which they have participated where a class action lawyer, representing individuals, has sought access to confidential or highly confidential information in the record.

Upon inquiry from counsel for AT&T as to what party to this proceeding had retained him, Mr. Bursor said that he had been retained by dozens of AT&T and T-Mobile customers to help them determine whether they wish to participate in this proceeding. He identified one – Astrid Mendoza, a named plaintiff in two previous class actions Mr. Bursor had filed against AT&T.¹⁰ The sudden appearance of a class action lawyer – with no prior involvement in FCC merger or acquisition proceedings and representing largely unnamed individuals with no apparent private interest to motivate them to pay counsel to oppose this transaction – raises concerns about how the confidential and highly confidential information in the docket will be used.

The *Protective Order* is designed to address those concerns. It bars counsel whose “activities, association, or relationship with any of its clients involve advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship” with Applicants from obtaining access to highly confidential information in this proceeding.¹¹ Such counsel have the incentive and ability to take the information they learn in this proceeding and apply it to the business decisions their clients make. And the risk of competitive harm is sufficiently great that the Commission has concluded that it is unreasonable to depend on their efforts to keep what they have learned from influencing the business decisions with which they are involved. Thus, the Commission denies

Footnote continued from previous page

No. 03-251; *In re SunCom Wireless Operating Company, L.L.C. Petition for Declaratory Ruling and Debra Edwards Opposition and Cross Petition for Declaratory Ruling Seeking Determination of Whether State Law Claims Regarding Early Termination Fees Are Subject to Preemption Under 47 U.S.C. Section 332(c)(3)(A)*, WT Dkt No. 05-193; *In re CTIA Request for Declaratory Ruling Seeking Determination of Whether Early Termination Fees Are “Rates Charged” Within 47 U.S.C. Section 332(c)(3)(A)*, WT Dkt No. 05-194. These three proceedings were the only ones found in a search of the Commission’s Electronic Comment Filing System for filings received on or after May 10, 2000 with “Bursor” in the Name of Filer, Lawfirm Name, or Attorney/Author Name fields.

¹⁰ *Mendoza v. Cingular Wireless LLC*, No. J.C.C.P. 4332 (Cal. Super. Ct. settlement entered July 21, 2010) (subsequent history omitted); *Ayyad v. Cingular Wireless LLC*, No. J.C.C.P. 4332 (Cal. Super. Ct. filed Feb. 11, 2004) (including Ms. Mendoza as a class representative).

¹¹ *Protective Order* ¶¶ 3-4.

Marlene H. Dortch, Esq.

May 12, 2011

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access to confidential and highly confidential information to such counsel to keep them from giving their clients an unfair advantage at the expense of Applicants, other carriers, and the public interest in fair competition.

The Bursor Firm stands in just such a position relative to AT&T and other wireless carriers. With a steady stream of litigation against AT&T and other members of the industry, the Bursor Firm will have the incentive and ability to use the information they learn in this proceeding in those other cases. And it is equally unreasonable to expect that they will be able to forget what they learn or “split their brains in two” to keep the confidential and highly confidential information from being used unfairly to the detriment of Applicants and other carriers.

For these reasons, the Commission should dismiss or deny the Acknowledgments of Confidentiality submitted by the Bursor Firm.

Respectfully submitted,

/s/ Peter J. Schildkraut

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/s/ Nancy J. Victory

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Counsel for Deutsche Telekom AG
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cc: Attached Service List

CERTIFICATE OF SERVICE

I hereby certify that on this twelfth day of May, 2011, I caused true and correct copies of the foregoing to be served by electronic mail upon:

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/s/ Peter J. Schildkraut
Peter J. Schildkraut

EXHIBIT B

FILED BY FAX
ALAMEDA COUNTY

July 08, 2009

CLERK OF
THE SUPERIOR COURT
By Denise Dalton, Deputy

CASE NUMBER:
JCCP004332

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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

Coordination Proceeding Special
Title (Rule 1550(b))

Case No. 4332

CELLPHONE TERMINATION FEE CASES,

**DECLARATION OF NADEEM FARUQI
IN SUPPORT OF PLAINTIFFS' EX
PARTE APPLICATION TO REMAND
CASE AND TO APPOINT LEAD TRIAL
COUNSEL**

This Document Relates To:

*Cherrigan et al. v. AT&T Wireless Services, Inc.
et al.*, Case No. RG03132892

I, Nadeem Faruqi, declare as follows:

1. I am a partner in Faruqi & Faruqi LLP. My firm has represented the plaintiffs in this action since prior to March 12, 2003, when it was initially filed. I make this declaration in support of the ex parte application of the plaintiffs, Alan Cherrigan, Porsha Meoli, and Sridhar Krishnan, seeking an order appointing Mr. Bursor as plaintiffs' Lead Trial Counsel in the *Cherrigan* case.

2. My firm was initially retained by Porsha Meoli, who has since been certified as one of the class representatives in this case. Due to his expertise in the field, we asked Scott Bursor to jointly represent Ms. Meoli with us, and to take the lead role in prosecuting her case against AT&T Wireless Services, Inc. Mr. Bursor agreed to undertake that role. Mr. Bursor drafted and directed the initial filing of the complaint in this action. Mr. Bursor has also led our efforts to defeat AT&T

DECLARATION OF NADEEM FARUQI IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION TO
REMAND CASE AND TO APPOINT LEAD TRIAL COUNSEL

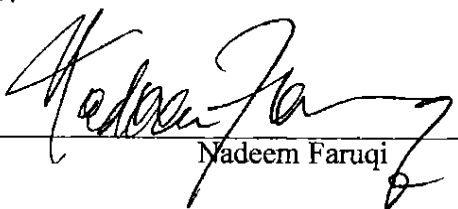
1 Wireless' motion to compel arbitration, to defeat AT&T Wireless' demurrers, and to secure class
2 certification of this action.

3 3. I understand that the Court has appointed an Executive Committee of three lawyers,
4 Mr. Plutzik, Ms. Mottek, and Mr. Franklin, to coordinate this case with a number of similar or
5 related cases. However, it was always my understanding the Mr. Bursor would try this case. In the
6 past, Mr. Bursor has served as Lead Trial Counsel, by consensus of the Executive Committee and
7 the plaintiffs in the previously tried ETF cases against Sprint and Verizon. The results in those
8 cases were outstanding, in my judgment.

9 4. The Executive Committee has never communicated to me or to my firm any reason
10 that Mr. Bursor should not serve in the same role as Lead Trial Counsel in this action. My firm has
11 invested substantial resources in this action over the past six years, and we did that based on the
12 expectation that Mr. Bursor would serve as lead trial counsel. That was and is important to my
13 firm because we believe that Mr. Bursor is the lawyer most able to effectively try the case, and that
14 he offers our clients' the best possible chance of winning. We would not have invested my firm's
15 time or money in a case that would ultimately be tried by a committee. I have never heard of a
16 case being tried by a committee of lawyers, and based on my experience and judgment, that
17 approach cannot possibly work.

18 5. For these reasons, my firm supports the class representatives' ex parte application to
19 appoint Mr. Bursor as plaintiffs' Lead Trial Counsel in the *Cherrigan* case.

20 I declare under penalty of perjury under the laws of the State of California and the United
21 States of America that the foregoing is true and correct, and that this Declaration was executed at
22 New York, New York this 29th day of June 2009.

23
24 
25 Nadeem Faruqi
26
27
28

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Bramson, Plutzik, Mahler & Birkhaeuser, LLP, 2125 Oak Grove Road, Suite 120, Walnut Creek, California 94598. On July 7, 2009, I served the within documents:

DECLARATION OF NADEEM FARUQI IN SUPPORT PLAINTIFFS' OF EX PARTE APPLICATION TO REMAND CASE AND TO APPOINT LEAD TRIAL COUNSEL

- ☐ by placing a copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Walnut Creek, California addressed as set forth below.
- ☐ by facsimile transmission on that date. This document was transmitted by using a Canon LC 710 facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (925) 945-8792. The transmission was reported as complete and without error.
- ☐ By causing personal delivery of a copy of the document(s) listed above to the person(s) addressed as set forth below.
- ☐ by depositing a true copy of the same enclosed in a sealed envelope with delivery fees provided for a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.
- ☒ by e-mail transmission on that date. These documents were transmitted via e-mail to the following e-mail addresses as set forth below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed on July 7, 2009, at Walnut Creek, California.



Peggy Toovey

CERTIFICATE OF SERVICE

I hereby certify that on this twentieth day of May, 2011, I caused true and correct copies of the foregoing to be served by electronic mail upon:

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